THE HOUSE OF LORDS & THE CONSTITUTION

"Constitute Government how you please, infinitely the greater part of it must depend upon the exercise of powers which are left at large to the prudence and uprightness of the Ministers of State. All the potency of the Laws depends upon them. Without them your Commonwealth is no better than a scheme upon paper, and not a living, active, effective Constitution."—BURKE.

THE HOUSE OF LORDS & THE CONSTITUTION

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WITH AN INTRODUCTION BY

THE RIGHT HONOURABLE

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THE LORD HIGH CHANCELLOR

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TO
MY MOTHER

PREFATORY NOTE

A CONSIDERABLE portion of this work has already appeared in the columns of the *Westminster Gazette* and the *Times*, and some sentences in the supplementary chapter are reproduced from an article by the writer which is to appear in the forthcoming number of the *Journal of the Society of Comparative Legislation*. To the Editors of these periodicals I tender my thanks for their courtesy in permitting me to reproduce here what I have written there. To Mr. J. A. Spender, the Editor of the *Westminster Gazette*, I owe something more than can be expressed by the formal acknowledgments of a contributor. I have to thank him for much wise counsel, as helpful as it was kind. Nor would my acknowledgments be complete without a word of thanks to Lord Fitzmaurice, whose ripe statesmanship has always been at my disposal.

J. H. MORGAN

THE TEMPLE
January 4, 1910

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INTRODUCTION

THIS volume is published at, I think, a very opportune season.

It is a singular thing that the British Constitution, which in all other civilised countries is scrutinised not merely by students but also by peoples as a model for those who aspire to ordered freedom, seldom attracts much attention at home. In tranquil times we never think about it. Like men in sound health we know that the heart, the lungs and the brain are performing their proper functions and rest content. In times of conflict, such as the present, we are too intent upon the social or fiscal needs of the day, often, as now, in themselves of supreme importance, to give adequate consideration to the machine of Government. Yet there are always at work influences and ambitions which tend toward an aggrandisement of one or other among the several powers in the State and a proportionate weakening of the rest. And if we would preserve the true balance there is need not only of an eternal vigilance but also of reasoning and research into past precedents, wherein may be found the historical origin of the rights we now enjoy, and warning of the danger which must arise if any encroachment

upon them is allowed. It is in this respect that the work of Professor Morgan is at this moment peculiarly apt and valuable.

Nothing of late has surprised me more than the assertions of several men of the highest reputation to the effect that they could not understand a distinction between the Legal and Constitutional powers of the House of Lords. One speaker, I believe, has gone so far as to declare that the distinction itself is merely a piece of pedantry. Let me examine this curious view. In law the Crown possesses powers so wide that a reckless exercise of them might lead the nation to disaster. The Crown could repeatedly dissolve Parliament within a year or within six months, could pardon any of the malefactors now in gaol, could make treaties of any kind with any foreign country, could alienate British territories, could declare war against any other nation or nations. And, indeed, some of these things (not the alienation of British territory), have been done in quite recent years by the lawful authority of the Crown without consulting Parliament. But in each case they have been done on the advice of responsible Ministers possessing the confidence not necessarily of Parliament but of the House of Commons. Courts of Law, however, have no concern with the advice given to the Crown, and still less concern with the question whether or not the advisers of the Crown have the confidence of either House of Parliament. In the case of Dissolution there is, indeed, a difference, for in some circumstances the Crown *proprio motu* dissolves Parliament. In the ordinary exertion of the Royal

Prerogative, nothing is more certain than that for a long period of time successive Sovereigns of this country have relied upon the advice of Ministers who have been selected because they enjoy the support of the House of Commons. And to this are largely due the complete confidence and affection with which the Crown is regarded even in the most troubled times. In a word, we live under a Constitutional Monarchy, to use a familiar expression. I do not know what this expression means, unless there is a real distinction between what is legal and what is Constitutional.

In a similar way the House of Lords possesses very ample legal powers. It can refuse consent to any or every Bill. It can, in strict law, insist upon amending any and every Bill, even a Bill of Aid and Supply to the Crown. A court of law would, no doubt, give effect to these powers, because it would not enforce any Bill, whether financial or not, to which the House of Lords had ultimately refused its consent. Are we then to conclude that, in refusing Supplies of the year, the House of Lords is acting constitutionally as well as legally? The answer is that as in the case of the Crown so in the case of the House of Lords, custom, grounded upon the practical necessities of a self-governing community, has erected a barrier which forbids this course except to those who are prepared to violate the Constitution. There are instances in which the House of Lords has rejected single Bills dealing with a particular tax, in most cases mixed with other and different matters of legislation. How far that was in accordance with usage I need not now discuss. In

no instance have the supplies of the year been refused ; that is, until 1909. And if this can be done, the effect of the new departure is not to be measured by the frequency with which the experiment may be actually repeated. The knowledge that the House of Lords can at any time force a dissolution by throwing out the financial proposals of the Government would be of itself sufficient to make it necessary so to compose a Ministry that it can command the support of that House. This means a complete change in our system.

In this volume Professor Morgan shows how great the change would be, how sudden and unforeseen an arrest it must prove of the gradual process by which our Constitution has come to be what it is to-day, how far-reaching must be the consequences. In an argument such as this, there must of necessity be points on which critics may differ, even though fully accepting his conclusions. For example, the effect and origin of the custom whereby financial Resolutions of the House of Commons operate instantaneously for taxing purposes, is partly associated with Statute law, and its antiquity cannot be ascertained without more elaborate investigation than has yet, so far as I know, been successfully bestowed upon it, perhaps because the more venerable records have been destroyed by fire. In this and other collateral matters there will always remain enough of obscurity in the evidence to justify more than one view. But on the main position, the organic growth of the Constitution, the gradual appropriation of distinct privileges and duties to distinct Estates of the Realm, the absorption by the Commons of all that belongs to

finance, and the danger of undermining the structure of government which has been built up on that foundation, I believe that Professor Morgan's opinions will soon be again regarded as indisputable, just as, until the last few months, they have not for many generations been disputed.

LOREBURN

THE LORDS AND THE CONSTITUTION

I

THE SEAT OF AUTHORITY

If persons are agreed as to the history of any country there can be no doubt whether a measure is to be characterised as constitutional or unconstitutional.—Lewis, "Essay on the Use and Abuse of Political Terms," p. 5.

"THE Lords have a right to reject the Finance Bill." "The Lords have no right to reject the Finance Bill." Of two such contradictory propositions both may be false unless the term "right" is carefully defined. Do we mean legal right or constitutional right? And can two such rights co-exist without a contradiction in terms? The answer would seem to be that the right is analogous to those rights of imperfect prescription, where a man has a right to a thing but has lost his right of action for it. The Lords still have the legal right but their exercise of it is attended with such grave consequences to other rights, notably the right of the Commons to the control of the Executive, which have grown up subsequently that their right to exercise it—though still a right in the juristic sense of a legally protected interest (it is negatively protected by the fact that no court

of common law will prevent or nullify its exercise)—has lapsed. But this still leaves us with the necessity for an explanation as to where the constitutional sanction or penalty for its exercise is to be found, if no such legal sanction exists. Is there not then a conflict between law and convention? And if there is such a conflict must not convention give way?

If we were living in 1689, when the King governed as well as reigned, the answer might be conclusive. The difficulty is that while the whole system of government has undergone a silent, imperceptible and unwritten development since that date, the law—both common law and statute—in so far as it relates to the exercise of government, has remained almost exactly where it was. We speak of a Cabinet, yet no such Cabinet legally exists. In legal theory Cabinet Ministers are privy councillors responsible individually for the exercise of the sign-manual warrant and the use of the great seal, but collectively not responsible at all. In legal theory they are servants of the Crown, not of Parliament, and the Crown might legally appoint a Unionist Secretary of State while a Liberal Prime Minister was in office and the Liberal Party in a majority in the Commons, and there would be no means of removing him short of the legal procedure of impeachment by the High Court of Parliament. A motion to reduce his salary on the Estimates would affect him not at all if he was content with the powers of office without its emoluments. A seat in the House of Commons or the absence of it he might regard with equal indifference. Not only might the King thus

legally govern but he might also legislate—or rather refuse to legislate. The King's veto is legally as unimpaired as when Queen Anne exercised it, although the exercise has never been repeated. Lord Lansdowne has pointed to the enacting words of a Money Bill, "By the King's most excellent Majesty with the advice and consent of the Lords Spiritual and Temporal." This appeal to the formula proves too much—too much because if the Lords may refuse their assent the King may refuse his too.

The exact value of the analogy with the King's veto cannot be better illustrated than by the fact that the Commons also prayed it in aid in 1689. But in 1689 the Commons had no control over the Executive, and were indeed anxious to exclude it from Parliament; to-day they have complete control, and non-usage is as conclusive against the Lords as against the King. Lord Lindley seems to have perceived the fallacy lurking in Lord Lansdowne's use of formulæ, and in order to give reality to the assent of the Lords has attempted to give reality to the assent of the King. "His Majesty," we are told, "can both legally *and constitutionally* withhold his assent to a Finance Bill."* This is a curious *ignoratio elenchi.* Lord Lindley contends that if he refused his assent, as he might "legally" do, a Minister would be constitutionally responsible for his refusal. But *ex hypothesi* in such a case he is refusing his assent to a measure which the Ministry has itself introduced—for Lord Lindley hardly needs to be told that by one of the oldest of the Standing

* See the *Times*, Dec. 14, 1909.

Orders of the House of Commons a proposal to raise money can only be introduced into the Commons on the initiative of a Minister of the Crown. Politicians may be capable of many things, as Adam Smith was fond of saying, but the Minister has yet to be found who will veto his own proposals. Lord Lindley completely begs the question—which is whether the Crown can act independently.

Where then is the sanction for the doctrine that the exercise of the King's veto is unconstitutional? Professor Dicey—in his admirable work on the Law of the Constitution—confronted with these conventions which are not law, has attempted to reduce them all to their lowest terms in common law, arguing that their ultimate sanction is to be found in the fact that their non-observance would involve the culprits in a breach of law—that, for example, Parliament would refuse to grant supplies to a Ministry which disregarded them, and that, as a tax cannot be legally imposed by the action of the Executive, the Ministry would be powerless to carry on the Government without coming into conflict with the law. This is both remote and inadequate—remote because no Ministry ever waits for a refusal of supplies or even contemplates the danger of it: the defeat of any Government Bill is quite sufficient; inadequate because it does not apply to such conventions as the non-use of the Royal veto or the observance of the Standing Orders of the Commons by the majority in favour of the minority. If the King refused his Royal assent, he would be little the worse if he were suffi-

ciently careless of the public interests. His income is assured by a permanent Statute and is a first charge on the Consolidated Fund more than met by permanent taxes. Surely the truth is that the conventions of our Constitution owe their authority to the common sense of the community, as evidenced by oral tradition, precedent, usage, and a consensus of authoritative opinion in the text-books. Here or not at all is to be found the General Will of the Community and not in the coercive organs of Sovereignty.* The source is the same in kind as the source of common law, which like Constitutional practice undergoes similar modifications. Just as the judges gradually formulate standards of negligence and thereby modify the law of civil wrongs, so do statesmen with the support of Parliament gradually develop constitutional usage. And there can be no question that the judges, whether it be a doctrine of common carrier or restraint of trade or public calling or anything else, are more or less consciously guided in such cases by the common sense of the community—the Time-Spirit, to use a Germanism. And so with the statesmen. The source is the same.

The analogy which has been drawn in some quarters between the submission of questions to a jury by the judge and the appeal to the people by the House of Lords is a very misleading one; not only is the judge in this case the party, but the question submitted is one of law and not of fact. We can no more submit the principles of the constitution to the verdict of the polls

* *Cp.* Green, "Philosophical Works," ii. 404.

than we can submit such mixed questions of law and fact as standards of conduct in the law of negligence to the verdict of a jury. The reason is simple: the jury is never the same, and the electorate is never of the same mind. Just as in the one case we should be "leaving all our rights and duties throughout a great part of the land to the necessarily more or less accidental feelings of a jury," so in the other we should be putting constitutional principles periodically to the hazard of alien issues at violent elections. What a great authority—*il maestro di color che sanno*—has said of the function of the common law may be said of constitutional law: "Its tendency is to narrow the field of uncertainty." *

If, as I hope to prove in the following chapters, the exclusive and final control of the Commons over Finance is supported by usage both written and unwritten and by the whole practice of government, it matters little that it has not yet received the sanction of the common law or of statute. It has not received the former because relations between the two Houses are part of the law and custom of Parliament—something which, like peerage law and the right of expulsion, the judges leave entirely to the High Court of Parliament; it has not yet been enshrined in the latter because Parliament has never taken the trouble to provide against a danger which seemed until to-day to be so remote as to be imaginary.†

* Holmes, "The Common Law," p. 127.

† No writer in this country has, I think, really quite grasped the juristic character of Parliamentary procedure. For a just appreciation of it one has to go to the country to which, alike in

There is another reason, however, why such issues cannot and ought not to be submitted to the polls, and that is that they involve a claim by the Upper House to exercise power without responsibility. The right of the House to force a dissolution is exposed, but much more exposed, to the same objections as the similar but much stronger right of the King to take the same step. The right of the King is admitted, but since he ceased to govern he has ceased to dissolve. His position towards the Constitution is here analogous to his position towards the common law: "Since the King may not risk anything, he also may not play the game." * The power to dissolve must be in the hands of those who take the consequences of its exercise, and if a Cabinet which has dissolved is defeated it pays the penalty by resignation. The Lords are liable to no such penalty. Ever since the reign of William IV.—one might indeed say much earlier, for Melbourne's "dismissal" was no dismissal at all and Peel accepted full responsibility—it has been admitted that dissolution by the Crown on its own initiative is almost impracticable because dangerous as imperilling the security of the monarch who practises it. Even a Ministry which dissolves does so on the understanding that it will be, to use a vulgarism, no "snatch" dissolution. The words of Peel on this point may well be applied to the action of the House of Lords at this juncture.

legal history and in jurisprudence, we owe more than we can repay, the country of Savigny, Ihering, Liebermann, and Brunner. I have in mind the acute analysis of constitutional law in Hatschek, "Englisches Staatsrecht" (Tübingen, 1905), i. 542, 581, &c.

* Pollock, "The Expansion of the Common Law," p. 78.

"I feel strongly that no Administration is justified in advising the exercise of that prerogative unless there be a fair reasonable presumption, even a strong moral conviction, that after a Dissolution they will be enabled to administer the affairs of this country through the support of a party sufficiently powerful to carry their measures. . . .

"I do not think a Dissolution justifiable to strengthen a party . . . there is a tendency to blunt that instrument if it be resorted to without necessity. . . .

"I do not mean a support founded on a concurrence on [merely] *one great question of domestic policy*." *

If we are to fall back on the bare letter of the law, we may find ourselves confronted by some strange consequences. Legally, the King, as Blackstone pointed out, can by treaty cede British territory; † he may pardon any criminal however desperate, dismiss any civil servant however faithful; he might pass spurious claims to the revival of old peerages,‡ and so destroy the character of the House of Lords; he might, through the Home Secretary, refuse an Admiralty contractor any redress for breach of contract by the Admiralty. He does not do these things because he is a constitutional monarch, and being a constitutional monarch, the exercise of his right has come to be conditioned by usage and not caprice. The Commons, once they obtained control over the Executive, have been content

* "Letters of Queen Victoria," ii. 348.

† Lord Curzon seems to have quite misapprehended the action of the Conservative Government in the Heligoland case. The Crown, as many eminent legal authorities from Selborne to Harcourt have pointed out, need not go to Parliament; the action of the Government was purely optional.

‡ As to the unrestricted power of the Crown as to claims, there seems to be no doubt. Cp. *R.* v. *Knollys* (1694), cited in Holdsworth's "History of English Law," I. 193. And *cp.* Palmer ("Peerage Law," p. 21, &c.) who admits that the declarations of the Lords Committees of Privileges are the exercise of a merely "*constitutional* jurisdiction."

to appropriate these prerogatives instead of abolishing them. But they and their like are potent weapons which a strong Ministry backed by a strong majority in the Commons might put into practice against the House of Lords with terrible effect. Liberals, philosophical and political, have long seen great potentialities in the prerogative as an instrument of popular will.* A practice has indeed grown up of late years of the Ministry's submitting its exercise of the prerogative in making great administrative or political changes to Parliament and the practice has great advantages—it gives the subject legal rights against the Executive by the use of the writ of mandamus which he would not otherwise possess; it substitutes final legislation for revocable ordinances, it submits large and vague powers to Parliamentary definition; even though at the same time it may remove some branches of the Executive from Parliamentary control by making them statutory where they were prerogative.† But a future Liberal Ministry will be less than human if they decline in future to take the Lords into their confidence and prefer to make such changes by prerogative order nstead of by Bill.

If "rights" were to be exercised without regard to constitutional usage, not only the Ministry but the Commons might do strange things and surprising. They might, for example, disfranchise all the Unionist

* *Cp.* Locke on Parliamentary Representation, cited in Green's "Philosophical Works," II. 385, and Sir William Harcourt in the Heligoland debate (Hansard, Vol. 347, p. 764, &c.).

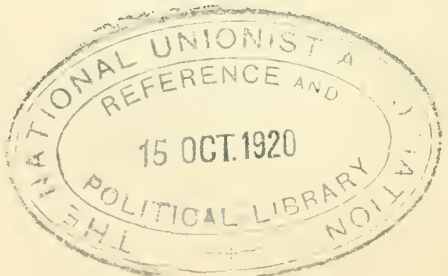
† See the debates in the Lords on the position of the Army Council under the new Army Annual Act in 1909.

constituencies in the country by refusing to allow the members returned to take their seats, or rather by expelling them without showing any cause.* They might pass large and contentious Bills through the House of Commons at one reading—the House of Lords could take no notice of the breaches of procedure of the other House nor could the Clerk of Parliaments, still less could the judges who were called upon to interpret an Act so passed. They might suspend all those Standing Orders upon which depend the rights of His Majesty's Opposition.† But we have hitherto enjoyed the reputation of being a sane people.

* *Cp.* Bovill, C.J., in *Beauchamp* v. *Overseers of Madresfield*, on the unquestionable jurisdiction of the House to determine its own membership, 8 C.P. 245 (1872).

† *Cp.* Mr. Balfour at Haddington, Dec. 20, 1902:

"The British Constitution, as it is now worked, is essentially a party system; but a party system can only be worked under really healthy conditions, can only be worked, at all events, under the best conditions, when the differences between the parties, though real, are not fundamental, essential, or of so revolutionary a character that they divide the classes of society or the sections of opinion in hopeless alienation one from another. The other evil from which some of our Continental neighbours in the course of their history bitterly suffered, is that they have attempted to work the party system when the division between parties is so vital and fundamental that the 'ins' desire to destroy the 'outs,' and the 'outs' attempt to become the 'ins' *by revolutionary methods* if no other methods are open to them. That is not the condition of things under which you can, in my judgment, work the representative system with any hope, with any prospect, of success."



II

THE ARGUMENT FROM PRECEDENT

THERE are two arguments against the claims of the House of Lords to reject the Finance Bill—the one historical, the other practical; the one looking to precedents, the other to consequences.

The two, indeed, hardly admit of divorce—it is largely because precedents for its exercise are so remote (if indeed they can be found at all) that practices have grown up which are at variance with it, and which its exercise must imperil, if not destroy. Such practices represent the whole of the settled order of government, and they may be summed up in two propositions: (1) that the control over Expenditure is in the hands of the Commons and (2) that the Commons also exercise exclusive control over the Executive. It would be difficult to ascribe to either of these established claims a priority in time over the other—the two have grown up together. It is in proportion as the Commons have obtained control over the appropriation and audit of accounts that they have obtained control over the Executive. It is as an officer of the House of Commons that the Comptroller and Auditor

General has statutory powers to control the issue of public moneys out of the Exchequer at the request of the Treasury and the spending departments; it is as a Committee of the House of Commons that the Public Accounts Committee exercises procedural powers * to examine the actual expenditure of these moneys so issued—to summon civil servants before them and inquire whether the money in the hands of the Executive has been spent to the best advantage. It is worthy of remark that these powers of the Committee of Public Accounts—which could be enforced against any one if necessary by the Speaker's unquestionable jurisdiction to commit for contempt—rest on nothing better than a Resolution of the House of Commons of 1862. Are we then to conclude that they are merely "conventional" in the sense of something lacking legal sanction? It seems to me that those who support the legal claims of the Lords on the ground that convention cannot stand against law will, like Professor Dicey, have to take a very narrow view of what law means. On the other hand, while the conventional powers of the Public Accounts Committee fall very little short of law, the legal powers of the Comptroller and Auditor General have little practical meaning apart from convention. He is an officer appointed under a statute (the Exchequer and Audit Act of 1866) passed by both Houses, removable only by both Houses, and yet he regards himself as the officer not of the Lords but of

* I use the word to distinguish powers exercised by the authority of resolutions of the Lower House from those exercised by statutory authority.

the Commons.* Why? Partly because convention has never regarded accountability as meaning anything else but accountability to the Commons; † partly because the statute itself, while constantly speaking of the control of Parliament, expresses by implication that such control can at most mean nothing but the control of the House of Commons. ‡ (See §§ 22 and 27.)

Or take the Appropriation Act which embodies the principle, put forward tentatively in the seventeenth century when the Commons were feeling their way towards control of the Executive, that the money which the Commons grant the Commons shall control. The Appropriation Act gathers up into statutory schedules all the votes of "supply" which represent the purposes for which the Commons intend the money to be used. Now their votes authorising Expenditure have no more legal validity § than have the resolutions authorising taxation. Yet if the House of Commons chooses to authorise the Treasury by a mere resolution to make advances to departments to meet unforeseen contin-

* See Report of Select Committee on National Expenditure 1902 (No. 387), p. 49. Evidence of Comptroller and Auditor General: Question No. 765: "You are responsible to Parliament? —I am responsible to the House of Commons." And *cp.* p. 65.

† "The disposition as well as our granting money by Act of Parliament hath ever been in the Commons."—Commons Journals, X. 666 (1691), and *cp.* Hatsell: Precedents, III. 131 and 495.

‡ 29 & 30 Vict. c. 39. The accounts "shall be laid before the House of Commons" (s. 22); "Every appropriation account shall be examined by the Comptroller and Auditor General on behalf of the House of Commons" (s. 27).

§ *Cp.* the opinion of the Law officers of the Crown cited in the Report of the Committee of Public Accounts, 1903 (Parliamentary Paper No. 304).

gencies in anticipation of these votes—it may do so; it has done so, and I know no legal way of preventing it from so doing. One may go a step further and say that while the Executive is prevented from spending money in other than the ways Parliament has determined, there is no legal way of forcing it to spend it in that particular way *; it need not spend it at all. The only way of enforcing its expenditure is by the control of the Commons over the Cabinet—the Lords cannot enforce its expenditure.

To come to the Appropriation Bill itself. Here is a legal instrument which authorises the Executive to spend a large sum of money within the financial year; and to borrow, if necessary, in order to get it on the strength of the assumption that Parliament will within that time find the money by means of another bill—the Finance Bill. The Appropriation Bill undoubtedly requires the assent of the Lords. But so well rooted is the theory that the appropriation of public money belongs exclusively to the Commons that there is not a single case on record of the Lords having refused assent to an Appropriation Bill,† not for many years have they even discussed it; their assent to it is as formal as the royal assent to Bills passed by both Houses. Is not their omission even to "touch" ‡ such

* See *Reg.* v. *Lords Commissioners of the Treasury* (L.R. 7 Q.B. 390), the leading case on the subject.

† See Report of the Select Committee appointed to search the Journals of both Houses on the Practice of each House as to Tax Bills (1860), p. xlvi: "Bills appropriating supplies amended or rejected by the House of Lords. No cases found."

‡ This conclusive verb is Mr. Balfour's: "We all know the power of the House of Lords . . . is still further limited by the fact that it cannot touch those Money Bills which, if it could

a Bill—a Bill which gathers up the votes of supply that have proceeded *pari passu* with the grants of taxes—of persuasive authority in support of the contention that they will not touch a Finance Bill? Is it not presumptive evidence that the rejection of a Finance Bill—throwing back the Treasury on heavy borrowings* in default of the taxation for which the Finance Bill, if passed, would have provided—has always been regarded as abnormal, impracticable and contrary to the whole of that part of the law and custom of Parliament—the Standing Orders of the House of Commons—which regulates financial procedure?

Mr. Gladstone's famous resolutions of 1860 were, therefore, like so many previous resolutions of the Commons on the same subject, not so revolutionary as they seemed—they merely gave expression to a process of development which had been going on for many years almost imperceptibly, and the declaration that "the exercise of the power of rejection is justly regarded by this House [of Commons] with peculiar jealousy, *as affecting the right of the Commons to grant the supplies*," was not a new claim but the re-statement of an old one.† The Commons as early as the 17th century were just as vigilant against proposals of the Lords to reduce

deal with, no doubt it could bring the whole executive machinery to a standstill." (See the *Times*, June 25, 1907.)

* In other words, the action of the Lords is constructively a violation of the fundamental principle, accepted by both Houses as the basis of the admitted inability of the Lords to amend Money Bills, that the Lords may not lay a charge on the subject.

† The consolidation of all financial proposals in one Finance Bill naturally followed the consolidation of all grants of money in one Appropriation Bill. The earlier practice had been to assign a particular tax to a particular object. Nowadays these

the taxes they had granted as to increase them. It is curiously significant that their most notable, and indeed their most successful, protests against the attempts of the Lords to amend Money Bills relate, not, as one might expect, to increases but to reductions. A sound political instinct told them that the reduction * or even the rejection † of a tax may easily involve an infringement of their exclusive right of grant. This is not the occasion on which to enter into the history of financial procedure, but it is not unprofitable to remark that the precedents (there are only seventeen of them altogether in the whole recorded history of Parliament) for the rejection of Money Bills are quite worthless as evidence on one side or the other in this controversy unless they are examined in the light of that history. Without some such critical apparatus instances taken at random from the Parliamentary Journals are as misleading as would be a study of inscriptions which ignored philology.

objects are represented by votes consolidated in one Appropriation Bill, and it is assumed that the votes will be met by the Finance Bill. The history of Appropriations is well summarised in Lord Welby's Memorandum in the Appendix to the Report of the Select Committee on National Expenditure, 1902. See also Redlich, vol. iii. *passim*, and Ilbert, "Legislative Methods and Forms," Appendix.

The close logical connection between Supply and Taxation is illustrated by the relaxation of the rule as to amendment of Money Bills in cases of a local or special character; *e.g.*, the imposition of a fee or penalty may be amended in the Lords if it is *not payable into the Exchequer*. As to private Bills, *see* Clifford, "History of Private Bill Legislation," 785.

* In the classical case of 1671 the Lords had amended a Money Bill by way of *reduction* of the charge. (Commons Journals, IX. 235.)

† *Cp.* the language of the Attorney-General in 1671: "It would be a double check on His Majesty's affairs if the King may not rely upon the *quantum* when once his people have given it." (*Ibid.* 239.)

Now the point about these rejections is that not one of them has the remotest analogy with the rejection of the Finance Bill of 1909. If the House of Lords rejected a Money Bill in the 18th century it did not thereby leave the supply services unprovided for. Until the year 1830 the government of the country was to a large extent supported by permanent charges on the Civil List, *i.e.*, the "salary" of the sovereign and the salaries of civil servants were met by permanent statutory charges on the national income. They were not as now "supply" services met out of annual votes; the House of Commons therefore did not exercise a regular annual control over the executive Government.

As for the permanent taxes—such as the grant at the beginning of each reign of tonnage and poundage whereby the Civil List was provided for—there is not a single instance of the Lords having rejected a Money Bill of that character. The Money Bills which they rejected * were of one of two kinds: they were either small Bills by which, as was the fashion of that day, a particular tax was imposed to meet a particular exigency, generally a very trifling exigency, often of such a character as would be met to-day by the Treasury out of the Civil Contingencies Fund or by a Vote on Account—or else they were what we may call political Bills, Bills temporarily increasing or reducing for a political purpose a duty on one of the innumerable articles which were then subjected to import duties.

* Even as to these it must be remembered that until the end of the eighteenth century the Executive sometimes (*e.g.*, Pitt's Ministry in 1783) depended on the Lords rather than the Commons.

Of the rejection of anything that could be called a Money Bill in the modern sense there is no instance. The Lord Chancellor was therefore perfectly justified both in law, in constitutional law, and in fact, in saying that the action of the House of Lords was as unconstitutional as it was unprecedented—and that no legitimate inference from his admission as to the right, the constitutional right, of the Lords to reject a Money Bill like the Scotch Valuation Bill could be drawn as to the existence of any such right in regard to a Supply Bill. The distinction between Bills making provision for the supply of the year and Bills dealing incidentally with financial matters is a perfectly sound one. It is made in the classical book on Parliamentary Procedure of Professor Redlich.* The rules relating to the two are substantially different. It is surely a curious *non sequitur* to argue, as did Lord Lansdowne, that because a Valuation Bill which does not tax may be rejected a Taxation Bill which values may be subject to the same disability. Unconsciously he supplied his own refutation by remarking that the Scotch Valuation Bill had been amended—which if it had been a Money Bill would of course have been out of the question.

The conclusion would seem to be irresistible. If the Lords have never ventured to claim the right—have indeed gone far expressly to repudiate it!—to reject Money Bills making provision for the goverment of the country, must not admissions † to that effect made in

* See "The Procedure of the House of Commons," III. 118.

† The "Reasons" of the Lords in 1671: "By this new maxim of the House of Commons, a hard and ignoble choice is left to the Lords either to refuse the Crown supplies, when they are most

favour of the Commons at a time when the Commons had no control over the Government have gained rather than lost in the cogency of their application now that the Commons has such control? If this be not allowed, the only inference must be that the Lords are putting forward a claim to control the Executive.*

necessary, or to consent to ways of proportions of aid which neither their own judgment or interest nor the good of the government and people can admit." (C.J., X. 239). The Lords were claiming the right to amend and argued that the right to reject was worthless because impracticable and impolitic. The disclaimer of the Lords was even stronger in 1640. They disclaimed "any desire to meddle in matters of subsidy, no, not so much as to advise."

* In Australia the right of the Senate of the Commonwealth —which it must be remembered is an elective body designed to secure equality of representation among the States—to reject Money Bills (or rather "to return them at any stage," words which seem to contemplate something less absolute than the legal right of the Lords to reject) receives recognition in the text of the Constitution (Article 53). But the comment of an unimpeachable authority on this power is significant: "The Senate could hardly exercise the extreme power of rejecting the Bill for the ordinary annual services of the Government upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. But such a claim has never been put forward in the history of Parliamentary Government in the Colonies."—Harrison Moore "The Commonwealth of Australia," pp. 116, &c.

Colonial analogies must of course be used with care, because the direct intervention of the Crown, in the person of the Governor or Governor-General, to adjust disputes between the two Houses is possible there but impossible here. Note the suggestion as to the possibility of such intervention under the Commonwealth Constitution in Quick and Garran, "The Constitution of Australia," p. 673. As Mr. Bryce has pointed out ("American Commonwealth," i. 379), the existence of two Houses with co-equal powers is incompatible with Cabinet government as we know it.

III

THE ARGUMENT FROM DEVELOPMENT

MUCH speculation, both learned and lay, as to the relative values of law and of custom in the Constitution has been brought to bear upon the controversy which is now rapidly reaching its climax. There appears to be an opinion entertained among Unionists that the Commons privileges have lost their original force, or else have been "stretched" (to use Mr. Balfour's expression) to cover circumstances not originally contemplated. For example, Mr. Murray, in a letter in the *Times* of November 11, which constitutes, to my mind, one of the best-reasoned statements of the case for the Lords that we have had, reminded me that the object of the seventeenth-century Statutes (the Petition of Rights and the Bill of Rights), which I cited in my article * on the Legal Value of Financial Resolutions in the *Times* of November 10, was to protect the Commons and their constituents against extra-Parliamentary taxation at a time when the Executive was responsible not as now to the House of Commons but to the King. This is unimpeachable, but when he goes on from Statute Law to Commons privileges, and construes the latter

* This article is reproduced, with some additions, in the last chapter of this book.

in the same sense with a view to impairing their force at the present day, I find it difficult to follow him. He appears to argue that since the Executive was responsible to the Crown, and the Crown was closely identified with the House of Lords, the formulation of the privileges of the Commons in Money Bills during the same period is to be explained by their anxiety to prevent the initiative of the Crown in taxation from falling into the hands of the other House, and therefore, that danger being removed now that the initiative is exercised by an Executive responsible to the Commons (Mr. Murray would say a Commons subservient to the Executive), the privileges have lost their meaning, and are, in fact, in danger of perversion. Designed originally to protect the taxpayer against an arbitrary Crown in Council supported by a complaisant peerage, they are now being used, it appears, by an arbitrary Cabinet dominating a servile Commons to oppress him. On this view it would indeed seem that the Commons now stand for prerogative, and the Lords for privilege; the privilege, presumably, of the oppressed taxpayer.

The premisses are plausible and the conclusion ingenious, but the argument, like so many others on the same side, surely proves too much, and what is more it is an argument which, as a learned judge once said of the doctrine of "public policy," is like a horse that once you get astride of it may run away with you. If the privileges of the Commons are thus to be explained away as largely obsolescent, if not obsolete, why stop short of the Finance Bill? On this argument the Lords have a right to revise the Estimates, and to amend the

Appropriation Bill. No check, in the professed interests of the taxpayer, upon taxation can be normally effective unless it extends to the Estimates. And the power of the Cabinet to dictate taxation—of which Mr. Murray and his friends make such a grievance—is as nothing to its power to fix the Estimates which condition taxation, and, what is more, to get them voted. The rules relating to supply—quite as much as the Commons' privileges—have lost their original meaning, which was to protect the Commons against an Executive responsible only to the Crown, and have become subservient to the convenience of the Cabinet (responsible for the allocation of Parliamentary time), so that large sums of money are voted with far less facilities for discussion than are extended to the Finance Bill, which makes provision for them. These developments in Commons procedure are largely the legitimate and, indeed, inevitable outcome of the organic growth of the House, which has developed from one of those low types of organism which are a perpetual repetition of similar parts into a highly complex organism with an increasing specialisation of function, and has substituted the General Will of the House for the unbridled Wills of its individual members. They are part of the process by which the House has passed from a debating society, in which every member could neutralise every other, into a governing body, and the landmarks of the process are: The precedence of orders of the day over notices of motion, the rules as to relevancy, the magisterial powers of the Speaker, the extension of the rule of

progress to supply,* and a thousand other developments each arising logically out of the others as the House, which may be presumed to know best its own business, has grown more business-like. It is natural that the constitutional cogency of these changes should escape the untutored minds of the Lords, whose procedure is as primitive as their functions are academic. All of them are undoubtedly restrictive of the rights of the elector,† whether regarded as taxpayer or as legislator. But it is not for the Lords to take them into account unless they are prepared to upset the whole balance of the Constitution. There have, indeed, been signs lately (in the Lords' debates on the Irish Land Bill) that the other House will presume to base their treatment of Bills, whether Money Bills or others, on the procedure applied to them in the House of Commons—a highly improper pretension, and one which the Commons in the seventeenth century would not, as I might show by chapter and verse, have tolerated for a moment. One might search the scriptures of both Houses in vain for the recognition of such a claim.

If this kind of argument is to prevail, and if these

* This is perhaps the most remarkable of all the changes whereby rules designed to secure the initiative of the individual member against the Crown were adapted to the interests of the executive when it had become responsible to Parliament. The right of any member to move an amendment to the motion that the Speaker do leave the chair each day that the House went into Committee of Supply—a right which represented the old principle that redress of grievances must precede supply—gave way to the practice of reporting progress. *Cp.* the words of Speaker Denison cited in Redlich, i. 109.

† That is to say, they all tend to restrict the initiative of his representative, the private member.

considerations are to be pleaded by the Lords and their apologists—as, indeed, on any show of justification they must—I see no limits to their pretensions; procedure, privileges, finance, and as a result the control of the Executive itself will all be subject to their review. Indeed, I do not see how the Commons—at any rate under a Liberal Government—can ever hope again to confront the Lords with a single financial programme, such as has been customary for the last sixty years and usual for nearly one hundred and twenty. As I attempt to show in my last chapter, the purely voluntary respect paid by the taxpayer to financial resolutions of the Commons (one of the most remarkable examples of the political sense of Englishmen) has depended on the universal assumption that the Lords will leave the Finance Bill untouched. But with that assumption once shaken the Executive will in future be intimidated from collecting taxes without statutory authority; either taxes will not be collected at all until the Finance Bill reaches the Lords or else each resolution will have to take immediate shape in a separate Tax Bill and be sent up to their lordships at once. This will not only enormously increase the difficulty of presenting a balanced account to the Commons in the form of the Budget—it may make a permanent addition to the burdens on the taxpayer by necessitating heavier borrowings by the Treasury to anticipate the yield of the taxes than has hitherto been the case, and, what is of infinitely more importance, it will establish a claim of the Lords not only to reject but to amend. In claiming the right

to reject this year's Money Bill the Lords are, therefore, most undoubtedly laying the foundations of a right to amend the financial programme of any future year. You cannot reject one of several Tax Bills without amending the whole scheme. And from all this to claiming an initiative there is but a step.

Where is this to stop? Far-reaching retaliations are possible, and many other things besides the privileges of the Commons will be in peril. The whole force of the argument in the Wensleydale case against the claim of the Crown to create life peers was not so much that it was against peerage law (there were great authorities and weighty on the other side) as that the exercise of a prerogative so long disused would "upset the settled balance of the Constitution." If the Lords are going to upset the settled balance in one direction they may find it upset in many others, and a Liberal party triumphant at the polls (whether at the next or at a later election does not matter) may call into exercise disused prerogatives with revolutionary effect. *Nullum tempus occurrit Regi* might be given some surprising applications by a strong Cabinet, applications which would be none the less legal for being unconstitutional. The Commons with extraordinary acumen saw similar possibilities in the conflict with the Lords in 1671, when, in answer to a rhetorical question as to "Where was the contract or charter?" by which the Lords had divested themselves of their right in Money Bills, they replied with the crushing rejoinder, "Where is the record?" by which the Commons had divested themselves of the appellate jurisdiction exercised exclu-

sively by the Lords. (See Commons Journals, IX. 239.)

Well did Bacon say, "Stir not questions of jurisdiction." If such rude shocks as the Lords contemplate are to be administered to so delicate and complex an organism as the British Constitution the effects will be felt in every part, and the resulting changes are likely to be not merely functional but organic.

I have accepted the premisses for the sake of showing where the argument for the Lords must lead one, but I am not prepared to accept them unreservedly. The substitution of exegesis for apologetics in the study of the Commons Journals is welcome, but I think it might in that case be argued that the Commons in the seventeenth century had in view quite as much the unrepresentative character of the Upper House as its close connection with the Crown. It is not without significance that the claim of the Peers to confer with the Commons as to making grants of taxation and to assess themselves disappears just about the time when they ceased to represent a peculiar source of revenue. The abolition of feudal tenures and the development of peerage law in the seventeenth century converted the House of Lords from a body of taxpayers paying peculiar taxes and giving the Crown counsel in the capacity of its tenants-in-chief into the owners of a political franchise—an incorporeal hereditament, the political privilege of which survived its fiscal obligations. This fact was very vividly before the Commons when they pressed home their privileges, and a close study of the Commons Journals would reveal the pre-

sence of another—the fact that they were by no means indisposed to regard their insistence on their exclusive claim to amend as imperilling the admitted right of the Lords to reject. Their admissions on that point were highly academic,* and if they had anticipated the near development of a Parliamentary Executive they would most probably have denied the Lords the right of rejection as explicitly as they did that of amendment, just as they would probably have refused to surrender judicature to the Lords when they abolished the prerogative jurisdiction of the Star Chamber. This is matter of speculation, but jurists of eminence have surmised as much.

If the doctrine of development is to be applied to the canonical records of Parliament, it is not the privileges of the Commons which will suffer. Other things besides the shifting of the balance of the Executive will have to be taken into account. There is the notorious fact that the one House has grown more oligarchic in proportion as the other has become more representative. Peerage law has steadily developed in the direction of mediæval doctrines of the law of real property,†

* See the Appendix, 1689. They put the Lords' right of rejection on the same footing as the veto of the King—a veto which was, it is true, still active at that date, though never exercised in the case of Money Bills. It is hardly necessary to remind the reader that at that time the Commons repudiated the idea of Parliamentary control over the Executive and supplies were granted for the use of the Crown and not of a Cabinet.

† The way in which the House of Lords (which, sitting as a Committee of Privileges, is not bound by its previous decisions) has limited the prerogative of the Crown as to its powers to mark out the descent of peerages is not a little remarkable. The Redesdale Committee had held not only that the Crown could create life peers (an opinion which was disregarded in the

electoral law as steadily away from it. Moreover, what in the eighteenth century was regarded as almost a normal instrument in the hands of the Ministry for redressing a balance in the Lords adverse to the majority in the Commons—I refer, of course, to the creation of a decisive number of peers—has now become incapable of exercise.

The attack on the Commons' procedure and privileges proceeds, as it logically must, *pari passu* with a denial of their claim to represent the electorate. This is the ground of Lord Lansdowne's amendment, and it is ground which the most reactionary of the Peers who opposed the Reform Act of 1832 would have hesitated to take. No such far-reaching subscription to Rousseau's doctrine that the people of England are free only once in seven years has ever come from the Upper House before. It is sheer Jacobinism, and no writer of any repute on the Constitution from the days of Sir Thomas Smith to Blackstone onwards would have endorsed it for a moment. It represents a return to a rudimentary type of political organisation, in which, in the manner of the early Teutonic tribes, every political problem is solved by a loud and intimidating shout. One does not need to be a Hegelian in one's political philosophy to appreciate the tremendous gravity of such an act of historical apostasy. Englishmen who have woven the Constitution like a seamless garment on the loom of time are now invited to rend the fabric in two. That

Wensleydale case), but also that it could mark out a patent of creation in what form it pleased, an opinion which the Lords adopted in the *Devon* case only to repudiate it subsequently in the *Buckhurst* and *Wiltes* cases.

such a view should be taken by the Conservative Party, schooled in the philosophy of Burke and Maine, and proud to boast its exclusive possession of that "historic sense" in which the Radicals, philosophical and other, are supposed to be so singularly deficient, is one of the most amazing aspects of this amazing situation.

Such repudiations of the custom of the Constitution would leave us with nothing but common law. Common law is not enough. No one would question that the Lords have a *legal* right to reject, but if the argument of disuse, which the Lords themselves invoked in the *Wensleydale* case, has any force it certainly has it here. That "right" is best treated on the lines of the Apostolic injunction: "All things are lawful, but all things are not expedient." To the political philosopher the presumption against it will not seem any the less cogent for being based on custom and not on law. What the presumption loses in legal sanction it gains in ethical obligation. Political societies advance in proportion as they rest on voluntary morality rather than on imperative law. It is by this test that impartial jurists and publicists in other countries than our own—Hatschek, Laband, Redlich, Lowell, and a hundred more—have tried our Constitution and discovered therein its supreme excellence. But if in a crucial hour we can stand that test no longer, not only the Constitution as we know it and as they admire it will have been sacrificed, the political capacity of Englishmen themselves will have exhibited a new and an alien infirmity.

IV

THE ARGUMENT FROM CONSEQUENCES

If we believe a thing to be bad, and if we have a right to prevent it, it is our duty to try and prevent it, and *to damn the consequences*. —Lord Milner at Glasgow on November 26.

IF Pope's definition of wit—"What oft was thought, but ne'er so well expressed"—be the correct one, I do not think any one can deny Lord Milner the distinction of being the wittiest member of the Unionist Party. He will probably be repudiated by the more thoughtful and far-seeing members of the Unionist Party, but there is no denying that his cheerful, not to say truculent, levity represents the temper of our new Jacobins, and it may go down to history as the classical utterance of the sect. After all the austere and studied language of Lord Lansdowne and Lord Halsbury about the ancient and imprescriptible rights of the House of Lords, there is something so unpremeditated about Lord Milner's robust colloquialism that it bears all the marks of inspiration. It is not often that a statesman of the highest rank thus soliloquises in public, but, after the economy of truth with which discreet Unionists like Mr. Balfour have veiled the tremendous revolution they are provoking, no one will complain of his candour.

Lord Milner only expresses what a great many Unionists think ; it is not so much that he is a cynic as that they are all equally cynical. The wanton impatience of the remark seems to be characteristic of that strange intellectual and moral disorder which has steadily developed in the Unionist Party ever since its conversion to Protection, and which reveals itself in a total repudiation of all the ties of political obligation. The Finance Bill was hardly introduced before many good Conservatives began to talk and write as if the State to which they belong were nothing more than a joint-stock company—"a low concern in pepper or the like, entered into for the temporary benefit of the parties," as Burke said of the earlier Jacobins—and to threaten to sell out (to invest abroad, to cheat the Revenue, to emigrate, in short, to damn the consequences) the moment the tax-gatherer made a call upon their patriotism. The proud rubric of the older jurists, *Nemo potest exuere patriam*, has no charms for them. Hallam, perhaps the most philosophical writer, with the exception of Burke, who ever discoursed on the Constitution, was accustomed to write of it as if it were the breath and finer spirit of the English character, and no one who has studied the way in which the principles of that Constitution have reproduced themselves in the British Colonies, by a kind of spontaneous generation and with little help from letters patent, can deny that Hallam was right. A mere change in the instructions to the Governor directing him in future to choose his advisers from men who had the confidence of the Legislative Assembly was usually the only outward and visible sign of a transition from Crown

Colony to Responsible Government. The character, the inherited aptitude of Englishmen for self-government, did the rest. It is this character, this "completely fashioned will" in the Constitution, that Lord Milner and his friends are at pains to destroy. Divided between a financial policy which they do not like and a constitutional rule which they do not respect, they elect to destroy the latter. Their attitude seems to give new point to the aphorism of Machiavelli, who, carefully considering the weighty problem as to whether, in case of a rebellion—just such a painful dilemma as might have occurred to Lord Milner in the Boer War—it was more politic to hang a rebel or to confiscate his property, came, after mature reflection, to the conclusion that it was much better to hang him, because there were his children to be considered, and a child, as he gravely argued, will much sooner forget a paternal bereavment than he will forget being bereft of his patrimony. On the same principle it appears to Lord Milner and his friends much more politic to lay violent hands on the Constitution (which is, after all, only a matter of ethical obligation) than to allow the imposition of a tax which touches the much more tangible interest of property.

If this kind of intemperance stood alone it might perhaps be dismissed as nothing worse than the excitement of the hustings, or the inspiration of Fleet Street, where strong language is often mistaken for strength of mind. Unfortunately, its diregard of consequences is part of a general declension of public spirit in the Unionist Party, the signs of which during

the last six years have been too numerous to be ignored, and which threaten the very foundations of the moral order in our politics. As Mr. Gladstone was fond of pointing out, Cabinet Government in England depends on nothing more substantial than the loyalty of its members; destroy that, and you have nothing left but a mob of Privy Councillors. The same is true of its relations with the House; if the Cabinet has not the confidence of the House and does not take pains to preserve it, the House itself becomes demoralised as a deliberative assembly. We have already witnessed a cynical disregard of both these principles in the Unionist Party in the years of its Protectionist novitiate from 1903 to 1904. We are now confronted by a third—the repudiation by one of the two great parties in the Commons of the very rules by which the supremacy of their order is secured. These rules of conduct, of mutual forbearance and common adhesion to accepted standards, are not small things, although little will be found about them in the text-books of Constitutional Law. They have profoundly impressed every acute observer who has sat in the House of Commons, from Burke to Gladstone. It is just the absence of them that has made all the difference, for example, between the Prussian Government and our own, as Gneist, who did his best to secure a transplantation of the British Constitution, has regretfully told us. Cabinet Government has never really developed in Prussia, because, as any reader of Bismarck or Hohenlohe may discover for himself, there has never been that regard for conven-

tions which is essential to its existence. The same thing is apparent in Imperial Germany, where, despite all the efforts of jurists like Laband to develop our doctrine of Ministerial responsibility, the Ministers are clerks and the Chancellor either an autocrat or a tool.* The truth is, of course, that in both Prussia and in Germany, whatever chances of development Cabinet Government ever had have been ruined by the shock tactics adopted by Bismarck—notoriously contemptuous of constitutional forms—in forcing plebiscitary dissolutions at carefully chosen moments, much as our own Opposition recently tried a Navy scare. Some such power of keeping the Lower House permanently demoralised by the power to force a dissolution as the Bundesrath exercises over the Reichstag would seem to be what the Lords have in mind.

It would not be difficult, I think, to show that the pretension of the Lords to reject the Finance Bill must inevitably lead both to its control of the Executive and to a degradation of the functions of the members of the Commons. To take the second point first—the Commons are, both historically and etymologically, the meeting of the communities *(communitas communitatum)* of the realm. Changes in electoral law obscure the fact to-day, but it is still there. Its implication is obvious—a member of Parliament is not a mere delegate, with a *mandat impératif;* he is a representative, and on any theory of self-govern-

* See Bismarck, "Reflections and Reminiscences," ii. 195, and *cp.* Bülow's repudiation of the constitutionalism of German jurists like Laband in the German edition of his speeches to the Reichstag, "Reden," 148, &c.

ment which has got beyond a city-state or a forest-canton he stands over against his constituents as the permanent and corporate expression of their will.*

This fact, which the Lords pretend to dispute, was expressed as long ago as the reign of Elizabeth by an acute observer, in language so remarkable and so apposite that it is worth quoting at length:

"The most high and absolute power of the realm of England consisteth in the Parliament. . . . That which is done by this consent is called firm, stable and *sanctum*, and is taken for law. The Parliament abrogateth odd laws, maketh new, giveth orders for things past and for things hereafter to be followed, changeth rights and possessions of private men . . . appointeth subsidies, tailes, taxes and impositions. . . . *For every Englishman is intended to be there present, either in person or by procuration and attorneys.* . . ."

SMITH, "De Republica Anglorum," Bk. II. c. 1.

This conception of the office of a member of Parliament is, I think, the best answer to Lord Rosebery's suggestion that, as the Lords are largely affected by the land clauses of the present Finance Bill, they are entitled to have some voice in its consideration. The plea is a plausible one, but if it means anything it must mean a right to amend as well as to reject. Nor does it seem to accord with the traditional views of the subject, even supposing one could perform such a feat of

* This conception has been expressed in noble language by Burke in his speech to the electors of Bristol, November 3, 1774 (Works, i. 180).

economic analysis as to isolate the property of the peers from that of the community. It is, I think, new ground in this controversy, such as finds very little warrant in the Parliamentary records or other classical authorities. Consider the language of Coke in regard to impositions :

"It is said in divers records *per Communitatem Angliæ nobis concessimus*, because all grants of subsidies or aids by Parliament do begin in the House of Commons and [are] first granted by them ; also because in effect the whole profit which the King reapeth doth come from the Commons" ("Institutes," iv. 29).

This is borne out by the language of the Commons in 1671, when they even asserted, and apparently proved, in regard to Customs duties, that the Lords were bound to pass them without discussion (Lords Journals, XII. 494), pointing out (Commons Journals, IX. 239) that the Lords' "proportions in all taxes, in comparison to what the commonalty pay, are very inconsiderable."

I doubt if Lord Rosebery's contention has ever received much recognition. Blackstone confines the Lords' right of rejection—which he treats as highly academic—to cases when the Commons are "too lavish" in their grants. Indeed, the whole idea of rejection seems to be an historical afterthought put forward (not very confidently) by the Lords when they

found they had lost the initiative, and its sequel, the right of amendment. So long as they had any control over the Executive they never seem to have claimed the right of rejection at all, for they were only too conscious that to reject Money Bills is to paralyse the government of the country. The student will find some handsome admissions by the Lords on that point in the Commons Journal for 1671.* If this be so, the claim of the Lords rests on nothing better than an anachronism.

From an early date we find a member of Parliament regarded as the financial plenipotentiary of his constituency; and one will find the idea applied very cogently to Money Bills in Coke's "Institutes" (*e.g.*, IV. 29 and 34). This conception of the dignity and function of a member of Parliament exercises a profound influence on the process of legislation in the Commons, and nowhere has it been better illustrated than in the progress of the Finance Bill, in the course of which members of both parties have, alike in Committee and in waiting at the head of deputations from constituents upon the Treasury, been able to exercise a considerable influence on the final shape of that measure. That influence is due not only to the fact that a member represents a community, which a peer can never do, but also to the finality of financial legislation by the Commons. The Treasury know just how much they can concede, because their concessions are final. The establishment of the right of the Lords to reject will change all that. Constituents

* See Appendix.

are not likely to take the trouble to wait on the Commons when they know that everything depends on the action of the Lords. Indeed, it is difficult to see how the Treasury itself can hope to control financial legislation in future unless it is directly represented in the House of Lords. It is, in fact, a pretty safe generalisation to make in constitutional law that wherever you have an Upper House with co-equal powers in Money Bills, there you have, and must have, Ministers sitting reciprocally in both Houses. The control of the Executive and the control of finance are inseparable; the whole of our elaborate system of Appropriation, Audit, and Accounts has grown with the growth of a Cabinet responsible to the House of Commons. How any adjustment between the two Houses will be effected in future under such circumstances it is impossible for the wit of man to foretell. We may be forced back on the frequent, direct, and partisan intervention of the Crown, with results to the monarchy which no friend of it can contemplate with anything but apprehension. There are, I believe, Unionists who would view such intervention with complacency.

The only argument of any cogency which has emerged in the Lords' debates—the argument against "tacking"—will not bear a very close examination. The classical instance of its assertion by the Lords (on the Land Tax and Irish Forfeitures Bill of 1700) had not the remotest connection with valuation, but related to a clause in a Money Bill whereby the Commons dealt with the qualification of members to sit in Parliament. Such a ques-

tion can only be decided by reference to the rules relating to amendment of Money Bills, and these (the language is that of two supreme authorities, Erskine May and Sir Courtenay Ilbert) cover "incidence, duration, mode of assessment, levy, or collection"—words sufficiently comprehensive, one would have thought, to cover any scheme of valuation, especially when it relates to the annual services.* Unfortunately, the question has in this country been decided in a purely empirical way, by reference not to the merits of each case, but to the strength of the parties in the course of the borderland warfare between the two Houses. But in the United States and Australia, where legislation is subject to review by a Supreme Court, such questions have received rigorous and scientific definition, and the opinions of writers of repute, such as Cooley, or Quick and Garran, would seem to include within the legitimate province of a Tax Bill "all the machinery" necessary to enforce it. It seems certain that the House of Lords, constituted as it is, is the very last body competent to decide it. If it is to receive authoritative definition at all it must be at the hands of a tribunal of much more judicial temper.

The effect of the present conflict on our party system cannot be anything but disastrous. If the Unionist Party succeed in carrying out this coup once they will

* One is tempted to ask the question, Why do the Lords accept one canon of interpretation as to what is a financial matter when they admit or assert their powerlessness to alter a clause of a financial character in a non-financial Bill such as the Voluntary Schools Bill of 1897 (see Hansard, vol. 48, p. 363), and apply quite another of a much narrower character when they wish to assert that the Finance Bill contains alien matter?

do it twice. The temptation to invite the Lords to ruin Liberal legislation whenever they object to it will be irresistible. The Liberals will be less than human if they retaliate—whenever they are in power—by drastic innovations in procedure. The protection of the minority in the Commons depends upon the Standing Orders, and it is easily conceivable that in such a case the majority, once they realise that the Opposition have abdicated their functions and are making auricular signals against their own estate to "another place," may disregard these Orders altogether.* Violence always breeds violence. Lord Milner, who has a ondness for martial law, might take to heart the wise words of Hallam about all such suspensions of constitutional guarantees, when he wrote of the fatal facility with which parties who have once had recourse to them are prone "to introduce too soon, to maintain too long, to pursue too far" so perilous a remedy.

* Greville ("Journals," iii. 288, 295, 359, 361) has some very acute remarks on the development of faction in the Lords and its reflection in the Commons since the passing of the Reform Bill.

V *

EPILOGUE

The Lords do not know what is going forward in this House, and, what is worse, they do not understand the principles of a Constitution. Shall we call it absolute ignorance of the Constitution or an insidious trial of our ductility and acquiescence? I have seen enough of their conduct to make me think the former not impossible. . . . If we have received a base affront from the Lords, let us not copy their example, but set them a pattern of what their conduct ought to be.—BURKE. Speech on June 3, 1772, on certain amendments made by the Lords in a Corn Tax Bill.

You have nothing to do with it; it is not for you to interfere with subsidies.—PITT, on a message from the Lords requiring information on a Subsidy Bill, 1786.

We are the natural guardians of the Constitution—the collective sense of his people His Majesty is to receive from the Commons in Parliament assembled.—BURKE.

Every member, though chosen by one particular district, when elected and returned, serves for the whole realm.—BLACKSTONE, Com. I. c. 2.

The great privileges belonging to this High Court of Parliament are not airy and Matters of Pomp, but have in them reality and efficiency whereby this great Council of the realm is enabled to perform all those noble functions which belong to them . . . and these privileges have been ever dear, and, he hoped, shall be to both Houses.—PYM, 1640.

Your lordships begin a new thing. We find ourselves possessed of it in all ages, and find not one grant of Tonnage and Poundage that is not barely [solely] the gift of the Commons. They hope your lordships will not now go about to assume this; a right so fundamentally settled in the Commons that *I cannot give a reason for it, for that would be a weakening of the Commons' right and privilege, which we can never depart from.*—THE ATTORNEY GENERAL, 1671.

THE words—first cited—of one who was, perhaps, the greatest of English commoners aptly characterise

* *The Westminster Gazette*, Dec. 2, 1909.

the present situation and the way in which the communities of the realm will meet it to-day. The House of Commons is never so dignified as in the assertion of its ancient and imprescriptible privileges. It does not argue, and it does not scold—it is seldom indignant and never disturbed. It is content, as Pym was content, to place once again upon its ancient records a declaration of those liberties which are "the rule and fountain" of the whole order of the realm. Strickland spoke up for them, Eliot died for them, Pym proclaimed them, Burke enshrined them in imperishable prose. They are part of the heritage of Englishmen, who have carried them, as they carry the common law, and as the Roman carried his household gods, into the uttermost parts of the earth. It is no idle metaphor to say that the eyes of every self-governing community in the civilised world are fixed upon the Palace of Westminster to-day. There is not a people in Europe which has not at one time or another sent its brightest minds, from Guizot to Gneist, from Gneist to Redlich, to wait upon this country, there to study the law and custom of Parliament and to try to reproduce it in their own. There is not a colony in the Empire which, once it has emerged from the tutelage of the Crown, has not sought to model its Constitution upon ours; and nothing is more remarkable in the long roll of letters patent than the way in which the fundamental principles of that Constitution are assumed rather than asserted. Whether, indeed, our ancient primacy will survive the present catastrophe is a matter as to which those who know best will feel inclined to say least. Already the Colonies

have begun to grow restive about the appellate jurisdiction of the Privy Council—it hangs by a slender thread, and the least misgiving as to its cogency would sever it. The Privy Council has decided cases of conflict between two Chambers whenever they have arisen by explicit reference to the constitutional usage at Westminster; violate that usage, and the Privy Council will be upon an uncharted sea, and few self-governing Colonies will accept it as a constitutional pilot. Nor will the tutelary authority of Downing Street command its ancient respect. Lord St. Aldwyn (then Sir Michael Hicks Beach), when Secretary of State for the Colonies was called in to advise the Colony of Victoria in a desperate struggle with an oligarchical Upper House; and in a despatch which deserves to rank as a classic he recommended them, like Burke in another connection, to "study the British Constitution"—to imitate the rules of mutual forbearance observed by both Houses in this country. Can a Secretary of State ever give that advice with the same confidence again? I fear not.

Be that as it may, even though the English Constitution may lose something of its ancient primacy and go through "great varieties of untried being," it will not be for want of dignity on the part of the Commons, whose self-respect has always been most marked when it has been most assailed. It would be easy to reply to the truculence of many of the champions of the peers in kind; but, as Burke said on the occasion cited above, "There is in the reciprocation of base affronts something that makes a Liberal mind revolt"—and

who, he asked, "does not think himself degraded by turning upon a Wapping landlady and giving her reproach for reproach?" Great men might be vouched to warranty in support of those ancient privileges, and not the least of them lawyers, despite all the doubt that has been thrown of late upon our conventions because they fall short of law; Selden, Coke, Plowden, Blackstone—these are great names and venerable in legal history, and all of them have subscribed to the integrity of the Commons' privilege in Money Bills. I have tried to show, so far as space permitted, that this claim of the Lords is not an old one, but an outrageously new one—an attempt to read history backwards and to find historical warrant for a pretension where none exists.

It is an anachronism, and the worst of anachronisms because it is the last. But its assertion has changed the face of English politics—the old order changeth, yielding place to new. Many things besides the veto of the Lords are likely to undergo a scrutiny—above all, that strange feudal anomaly in the modern world by which a political right is assimilated to the law of incorporeal hereditaments, and a constitutional veto is parted in lots among the peers like so many "sporting rights." No one who has studied the seamless web of the Constitution and marked the way in which Englishmen have been able to innovate, while they do not destroy, will view the coming revolution without profound regret:

> The glories of our birth and state
> Are shadows not substantial things.

The lines have acquired a new and painful significance.

But the gain will outweigh the loss. Englishmen, in the opinion of competent observers, were beginning to lose their respect for their own franchises—to give their votes like a gambler's throw—and to regard as an old song things that their forefathers in the seventeenth and eighteenth centuries reverenced in what now seems to us quaint and old-fashioned language, as "The Rights of Englishmen"—*Jura Anglorum*. All that will be changed. One cannot but be reminded of a remarkable passage in Newman's "Grammar of Assent," in which he speaks of the way in which some great truth—expressive, it may be, of the anguish of the Cross or the sad introspection of man—becomes so familiar by constant and docile repetition in our childhood that it ceases to have any significance for us and declines to a platitude or a truism. But years afterwards, in the crisis of some great experience—some humiliating sorrow or some mysterious and irreparable loss—the words suddenly come home to us and come home charged with a new and poignant meaning. I think it not illegitimate to apply that here. The ancient platitudes of common privileges have suddenly come home again.

SUPPLEMENTARY CHAPTER*

THE LEGAL VALUE OF FINANCIAL RESOLUTIONS

THERE appears to be a widespread opinion—not confined to supporters of the present Government—that a Ways and Means resolution of the House of Commons is sufficient authority at law to enforce the payment of taxes granted thereby. It has even been stated that there are cases in support of this view, although, unfortunately, no one in the course of this industrious controversy appears to have been in a position to cite them.

It would be interesting to know what authority there is for this supposition. It can hardly be contended that there is any legislative virtue in the resolutions themselves. No one has ventured to assert such a doctrine since the classical decision in the case of

* This chapter originally appeared in the form of an article in the *Times* of November 10, 1909. At that time much speculation was being indulged in as to the legal effect of the presumed rejection of the Finance Bill on the collection of taxes by the Executive under Ways and Means resolutions, and it was freely suggested in reputable organs of both parties that the Government might continue to collect on the bare authority of the resolutions. The Government has since settled the question empirically by declining to do so. As the above chapter attempts to show, they would otherwise have come into conflict with the law. The misapprehension on this point seems to be due to a confusion of legal custom with constitutional usage.

"Stockdale *v.* Hansard," where it was laid down in inexpugnable terms that no resolution of a single branch of the Legislature can take away the common law rights of the subject; among which a right to the undisturbed enjoyment of his property must certainly be included.

Nor is the argument of long acquiescence in the observance of these resolutions by the taxpayer in any better condition. The words of Denman, C.J., in the above case are worth quoting:

"The practice of a ruling power in the State is but a feeble proof of its legality. I know not how long the practice of raising ship-money had prevailed before the right was denied by Hampden; general warrants had been issued and enforced for centuries before they were questioned by Wilkes and his associates."

(III. State Trials, N.S., pp. 884–5).

The argument, however, appears to be that the practice of collecting the new taxes under the resolutions would receive judicial recognition as "the custom of the realm." If this means anything at all, it means that the custom is legal *per se*—that it has become incorporated into the common law. Without committing oneself to Austin's view that custom does not become law until it receives express judicial recognition and is enshrined in precedent, it is arguable that a custom which conflicts so directly with elementary rights at common law will certainly require a precedent to support it. If it is really "custom," it is difficult to see

why the advocates of this view limit its operation, as they do, to a period terminating either with the rejection of the Finance Bill, or at most with the end of the Session. As *ex hypothesi* the acceptance of the Bill embodying the resolutions by the Lords was not necessary to legalise them, so its rejection cannot be held to invalidate them. Nothing less than an Act of Parliament could repeal a custom received into the common law. As for the argument which, waiving this point, limits the vitality of the resolution to the duration of the Parliamentary Session, this can only be explained by a confused analogy with the right of the Lower House to commit for contempt, with which or with any other Parliamentary privilege it has nothing to do. Resolutions of the House are not necessarily, though they are frequently, to be construed with such a limitation.

There does not appear then to be any reason why the advocates of this view can logically escape the conclusion that the Lower House may impose permanent taxes by mere resolution.

Leaving, however, these dialectical issues aside, the doctrine of custom suffers from a conclusive objection which would be fatal to much more plausible examples. No custom, however ancient, reasonable, certain, and of presumptive obligation, can be recognised by the Courts in such cases if it conflicts with statute. And the words of the Petition of Right are insuperable :

"That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax or such-like

charge, without common consent *by Act* of Parliament."

Even Coke, the great champion of the exclusive right of the Commons in matters of taxation in the memorable dispute of 1628, did not venture when he drafted this clause of the "Petition" to assert even by implication the legal conclusiveness of a grant of the Commons.

The words of the Bill of Rights, though somewhat less unequivocal, would probably be construed to the same effect:

"That levying money *for or to the use of the Crown*, by pretence of prerogative, without grant of *Parliament*, for longer time or in other manner than the same shall be granted is illegal."

The words italicised are crucial. No one, I suppose, would dispute since the case of "Reg. *v.* Lords Commissioners of the Treasury" (L.R., 7 Q.B. 390) that taxes are still raised "for and to the use of the Crown," and the collectors of Customs or Inland Revenue are still the servants of the Crown, not of Parliament, acting, where they act without statutory authority, in virtue of the prerogative. The dualism of the Constitution is in strict legal theory almost as complete to-day as it was in 1689 or in the pages of Blackstone.

Moreover, nothing is more certain than that the Courts will scrutinise with extreme jealousy any

attempt of the Executive to impose taxation otherwise than by the express words of a statute. Even a departmental rule designed to carry out a statute by the imposition of a fee would be pronounced *ultra vires* if it partook of the nature of a tax. The Courts have invariably regarded a tax as in the nature of a penalty —lawyers are not economists—and, if the Crown, seeking to recover a tax, cannot bring the subject within the letter of the statute, the subject is free—there is no rule of equitable construction (*cf.* Lord Cairns in "Partington *v.* The Attorney-General," L.R. 4 H.L. 122). The law officers of the Crown certainly do not seem to be so confident as some of the advocates of the theory in question. Any one who looks at Clause 46, section 4, of the Finance Bill, will find it enacts by reference an indemnity clause as to deductions from dividends for income-tax.

If ever there was a case where a resolution of the House of Commons might have been pressed into the service of the Executive with some plausibility, it was the case of "Barrow *v.* Arnaud," in 1842 (8 Q.B. 595), perhaps the most remarkable of all the examples of the jealousy with which the Courts will regard charges on the subject, whatever the intentions of Parliament may be. There an astute importer in an action on the case against a collector of Customs succeeded in doing what all the forces of the Anti-Corn Law League had not been able to do—he established free trade in corn under a protectionist Government for five days, obtaining as he did a declaration from the Exchequer Chamber that the Act which altered the scale of import duties on

wheat had been of no effect for five days after it received the Royal Assent, on the ground that it only provided for the issue of the Controller's certificates of weekly average prices (on the basis of which the duty was to be assessed) on Thursdays, the Act having received the Royal Assent on a Friday (April 29)—consequently on corn imported between Friday, April 29, and Thursday, May 5, he was able to recover the duty paid with damages for detention of the goods. Yet, as any one may see on turning to the contemporary volumes of Hansard, Ways and Means resolutions declaring the new scale of duties had been reported to the House as early as the preceding March 2. But nothing was said of them in Court.

The only cases directly raising the question of resolutions with which I am acquainted are two Colonial cases, and these, I need scarcely say, are of no more than "persuasive" authority. Even when such cases come before the Judicial Committee of the Privy Council the decisions are notoriously not to be regarded too strictly as precedents; the Judicial Committee, unlike the House of Lords, is not bound by its own decisions, and those decisions, moreover, depend very largely on the interpretation of local Constitutions and statutes. But the only Privy Council case which might be cited ("The Colonial Sugar Refining Co. *v.* Irving," A.C., 1906) did not turn on the point in question at all—it dealt with the validity of a retrospective statute, not of a resolution. Of the two cases decided in Colonial Courts, in one, a New South Wales case, "*Ex parte* Wallace" (13 N.S.W., L.R., 1) the point of law was

not even argued—the illegality of the resolution seems, in fact, admitted; the only question was whether a peremptory writ of *mandamus* should issue to compel performance of a duty alleged to be statutory by a local Customs Act. But there is another, a Victorian case, "Stevenson *v.* Reg." *—it has, I believe, so far escaped attention—in which, in the course of a constitutional struggle bearing some remarkable points of resemblance with that with which this country is threatened, the Supreme Court decided the very point under discussion, and were unanimously of the opinion that taxes collected under a resolution of the Lower House were, and had been, illegal, even though the House was still in Session. As a result the taxpayers recovered in an action on an implied contract.

It may be asked why, if this be so, people with peculiar views on the fiscal limits of political obligation do not habitually challenge the action of the Revenue authorities. One may hazard a guess that, with the reasonable prospect of the resolution becoming law with retrospective operation by embodiment in the Finance Act, no one has ever desired to win a Pyrrhic victory—to win an action against the Revenue authorities only to be proceeded against a few months later for the payment, possibly with interest, of the very sum he has disputed. Moreover, Finance Acts do not, as some people at present imagine, expire on April 5—

* See the very interesting judgment in Webb, Wyatt, and à Beckett's "Victorian Law Reports," ii. 146 and 173. In this case the Legislative Assembly had tacked a new Customs tariff on to an Appropriation Act, and the Council, being unable to amend, had laid it aside. See the correspondence in "P. P." c. 2173, or "Accounts and Papers," vol. iv. of 1866.

even the "annual" taxes of one financial year (apart from the income-tax) usually, as in the case of the tea duty, hold good till the following is far advanced, and in a normal political year the interval between the passing of the resolutions and their embodiment in a Finance Act is short. Furthermore, the Revenue authorities have large statutory powers under those permanent Acts which seem to have escaped the notice of nearly every writer on the Constitution except Maitland, and these are such as might fortify them for a reasonable space of time (probably until a new Parliament was elected) against some of the fiscal difficulties which have been so freely suggested. The idea that importers could, the moment the Finance Bill was rejected, rush clearances of tea from bond duty free can only be entertained by people who have never looked at the Customs Consolidation Act.*

Perhaps it will save misapprehension if I point out that a denial of the legal right of the Commons to impose does not of course carry with it an admission of the constitutional right of the Lords to reject.

* See, for example, s. 30. The Inland Revenue authorities, however, are not in such a strong position.

APPENDICES

APPENDIX A

EXTRACT from the Rolls of Parliament, 9 Henry IV. No. 21. From "The Indemnity of the Lords and Commons," 1407. [The king attempted to initiate taxation in the House of Lords and had sent a message to the Commons requiring them to take steps to conform to the answer of the Lords.]

"Which report being made to the said Commons, they were greatly disturbed, saying and affirming that it was in great prejudice and derogation of their Liberties. And since our lord the King had become aware of this, not wishing that anything should be done now, or in time to come, which might be anywise turned against the Liberty of that Estate for which they have come to Parliament, nor against the liberties of the Lords aforesaid, he wills, grants, and declares, by the advice and assent of the said Lords, in manner as follows:—That is to say:—that it is lawful for the Lords to consider among themselves, in this present Parliament, and in every other in time to come, in the absence of the King, of the state of the Realm, and of the remedies needful for this. And in like manner it is lawful for the Commons, on their part, to consider among themselves on the same state and remedies. Provided always, that neither the Lords on their part, nor the Commons on theirs, should make any report to our said lord the King, of any grant, granted by the Commons and assented to by the Lords, nor of the discussions on the said grant, before that the said Lords and Commons are of one assent and of one accord in that matter; and then in manner and form as is accustomed,—that is to say, by the mouth of the Speaker of the said Commons for the time being; so that the said Lords and Commons shall be agreed with our King. Besides this, the King wills, with the assent of the Lords aforesaid, that the

discussion in this present Parliament had as above, should not be drawn into an example in time to come, nor be turned to the prejudice or derogation of the Liberties of the Estate for which the said Commons are now come, neither in this present Parliament nor in any other in time hereafter. But he wills that they, and all other Estates, should be as free as they were before."

[NOTE.—The reader who desires to pursue his studies into the origin of the exclusive power of the Commons to grant should consult that treasury of material Hatsell's "Precedents," vol. iii. See also Stubbs' "Constitutional History," iii. 263.]

APPENDIX B

Extract from the Lords Journals, III. 858, and Commons Journals, I. 912–914 (June 1628).

"An Act for the grant of Five entire subsidies, granted by the Temporalty.—Upon Question, passed."

"Upon Question, the Bill of Subsidy to be carried up to the Lords upon Monday morning next." "The Bill of Subsidy sent up by Sir Edward Coke, with almost the whole House following."

"*Hodie* 1ª *vice lecta est Billa.*" An Act for the grant of Five entire subsidies, granted by the Temporalty." And exception was taken to the said Bill, for that, in the Preamble thereof, the Commons are only named, and the Lords omitted. And it was agreed, To have a conference thereon between both Houses, but the Bill not to be sent back again unto them.

"*Hodie* 2ª *vice lecta est Billa prædicta.*" Message from the Lords, "That they desire a present Conference between a Committee of both Houses presently."

Conference agreed to.

"Sir Edward Coke reporteth from the Conference, that the Proposition of the Lords was concerning the Preamble of the Bill of Subsidy; wherein the Lords are excluded, contrary to ancient Precedent, though the last were so. That the Lords desire the words, 'The Commons,' may be put out. That they desire Warrant from this House, as they will also bring from theirs, that the Committee may so amend it."

"This course was not liked in this House, as being of a dangerous example, in point of consequence."

"A Message sent to the Lords, by Sir Edward Coke, That this House will take consideration hereof, and then send a Message to their Lordships."

"No Preface to be made, but in a word, that there is to be no Preface; and Mr. Speaker to read it."

APPENDIX C

Extract from Commons Journals, IX. p. 239, (April 22, 1671). Report of Third Conference with the Lords on Amendments sent from the Lords to the Bill for an Imposition on Foreign Commodities.

But, to come to particulars :

1. Your Lordships' first reason is from the happiness of the Constitution, that the two Houses are mutual checks upon each other :

Answer : So they are still, for your Lordships have a Negative to the whole.

But, on the other side, it would be a double check upon His Majesty's affairs, if the King may not rely upon the *quantum*, when once his people have given it ; and therefore the Privilege now contended for by your Lordships is not of use to the Crown, but much the contrary.

2. Your Lordships' Reasons, drawn from the writ of summons, is as little concluding : for though the writ do not exclude you from any affairs, yet it is only *de quibusdam arduis negotiis*, and must be understood of such as by course of Parliament are proper, else the Commons, upon the like ground, may entitle themselves to Judicature, for they are also called *ad faciend et consentiend de quibusdam arduis et super negotiis ante dictis*.

3. Your Lordships proceed to demand, Where is that record or contract in Parliament to be found, where the Lords appropriate this right to the Commons, in exclusion to themselves ?

Answer : To this rhetorical question, the Commons pray they may answer by another question : Where is that record or contract by which the Commons submitted, that Judicature should be appropriated to the Lords in exclusion of themselves ? Wherever your Lordships find the last record, they will show the first endorsed upon the back of the same roll. Truth is, Precedents there are, where both sides do exercise those several rights ; but none how either side came by them.

4. If the Lords may deny the whole, why not a part ? Else the Commons may at least pretend to bar a negative voice.

Answer : The King must deny the whole of every Bill, or pass it, yet this takes not away his negative voice. The Lords and Commons must accept the whole general pardon, or deny it ; yet this takes not away their negative.

The Clergy have a right to tax themselves, and it is a part of the Privilege of their estate. Doth the Upper Convocation House alter what the Lower grant? Or do the Lords or Commons ever abate any part of their gift? Yet they have a power to reject the whole. But, if abatement should be made, it would insensibly go to a rising, and deprive the Clergy of their ancient right to tax themselves.

[NOTE.—If this right should be denied, the Lords have not a negative voice allowed them in Bills of this instance, for if the Lords who have the power of treating, advising, giving counsel, and applying remedies, cannot amend, abate or refuse a Bill in part, by what consequence of reason can they enjoy a liberty to reject the whole; when the Commons shall think fit to question it, they may pretend the same ground for it.—From the "Reasons" of the Lords.]

5. Your Lordships say:

Judicature is undoubtedly ours; yet in Bills of Judicature, we allow the Commons to amend and alter: Why should not the Commons allow us the same privilege in Bills of Money?

Answer: If contracts were now to be made for Privileges, the offer might seem fair, but yet the Commons should profit little by it, for your Lordships do now industriously avoid all Bills of that nature, and choose to do many things by your own power which ought to be done by the Legislative: Of which we forbear the instances, because your Lordships, we hope, will reform them; and we desire not to create new differences, but to compose the old.

6. Your Lordships say, you are put to an ignoble choice, either to refuse the King's supplies when they are most necessary, or to consent to such ways and proportions, which neither your own judgment, nor the good of the Government or people, can admit.

Answer: We pray your Lordships to observe, that this reason, first, makes your Lordships' judgment to be the measure of the welfare of the Commons of England:

Secondly, it gives you power to raise and increase Taxes as well as to abate, for it may sometimes, in your Lordships' judgment, be for interest of trade to raise and increase a rate, as well as to lessen it: and then, still you are brought to the same ignoble choice, unless you may raise the Tax.

But it is a very ignoble choice put upon the King and his people, that either his Majesty must demand, and the Commons give so small an aid, as can never be diminished, or else run the hazard of your Lordships' re-examination of the rates; whose proportions in all Taxes, in comparison to what the commonalty pay, is very inconsiderable.

7. If positive assertion can introduce right, the Lords have no security; but the Commons may extend a right as they judge it necessary or expedient.

Answer: We hope no assertions or denials, though never so positive, shall give, or take away, a right; but we rely upon usage on our side, and non-usage on your Lordships' part, as the best evidences by which your Lordships, or we, can claim any privilege.

8. Your Lordships profess a desire to raise our esteem with His Majesty and the whole Kingdom; but not by the undervaluation of the House of Peers.

Answer: We have so great confidence in His Majesty's goodness, that we assure ourselves, nothing can lessen His Majesty's esteem of our dutiful affections to him, and we hope we have deserved so well of our country, by our deportment towards His Majesty that we shall not need your Lordships' recommendations to any, who wish well to His Majesty, or the present Government. But we are so far from wishing to raise an esteem by any diminution of your Lordships' honour or privileges, that there never was any House of Commons, who had a more just and true respect of that noble constitution of a House of Peers: of which your Lordships have had frequent instances, by our consenting to several Clauses in former Bills, for the securing and improving your Lordships' privileges.

9. We are sorry to see your Lordships undervalue the Precedent of this last Act of Tonage and Poundage*; because, though it were an Act of the last Convention, it was confirmed in this Parliament; and because the right of the Commons, there asserted, was pursuant to a former Precedent in 1642, and possibly had not passed so, if the younger Members of that Convention had not learned, from some of those great and noble Lords, who now manage the Conference for your Lordships, and were then Commoners, that this was the undoubted right of the Commons.

To conclude, the Commons have examined themselves, and their proceedings, and find no cause why your Lordships should put them in mind of that modesty, by which their ancestors showed a great deference to the wisdom of the Lords; for they resolve ever to observe the modesty of their ancestors; and doubt not, but your Lordships will also follow the wisdom of yours.

It was unanimously resolved: That the Thanks of the House be returned to Mr. Attorney-General, for his great pains and care in preparing and drawing up the Reasons, delivered to the Lords, in answer to their Reasons, which was by him performed to the great satisfaction of this House, in vindication of their Privilege, and just and undoubted right of the Commons of England.

And Mr. Speaker did accordingly deliver the Thanks of the House to Mr. Attorney-General (Parliament was prorogued the same day till April 16, 1672.)

* This refers to a precedent cited by the Commons to the effect that Books of Rates (*i.e.*, a Tariff) on Merchandise were to be submitted to the Lords, purely *pro forma*, without even being "read."

APPENDIX D

Extract from the Commons Journals, IX. 509 (July 3, 1678) :

"Resolved, &c., That all Aids and Supplies, and Aids to His Majesty in Parliament, are the sole gifts of the Commons. And all Bills for the granting of any such Aids and Supplies ought to begin with the Commons. And that it is the undoubted and sole right of the Commons to direct, limit, and appoint, in such Bills, the Ends, Purposes, Considerations, Conditions, Limitations, and Qualifications of such grants; which ought not to be changed, or altered by the House of Lords."

APPENDIX E

Extract from Commons Journals, X. 127 and 133 (May 1689).

"The reasons for disagreeing with the Lords' Amendment reported.

"The said Act for raising Money by the Poll, being an Act for the Raising and Levying of Money upon the Subjects of this Realm, for an Aid to the King and Queen, towards the Reducing of Ireland; and the Money and Aid to be so raised and levied; and all Money, Aids, and Taxes, to be raised or charged upon the subjects in Parliament, are the Gifts and Grant of the Commons in Parliament, and presented by the Commons in Parliament, and are, and always have been, and ought to be, by the Constitution and ancient Course and Laws of Parliament, and by the ancient and undoubted Rights of the Commons of England, the sole and entire Gift, Grant, and Present of the Commons in Parliament, to be laid, rated, raised, collected, paid, levied, and returned, for the Publick Service, and Use of the Government, as the Commons shall direct, limit, appoint, and modify the same: And the Lords are not to alter such Gift, Grant Limitation, Appointment, or Modification of the Commons in any Part or Circumstances, or otherwise to interpose in such Bills, than to pass or reject the same for the Whole, without any Alteration or Amendment, though in Ease of the Subjects. As, the Kings and Queens, by the Constitution and Laws of Parliament, are to take All or leave All in such Gifts, Grants, and Presents from the Commons; and cannot take Part and leave Part; so are the Lords to take All, or reject All, without Diminution or Alteration.

APPENDIX F

Extract from Commons Journals, XIII. 321 (April 10, 1700). Conference on amendments to Land Tax and Irish Forfeitures Bill:

"The Lords cannot agree to the Clauses that create an incapacity in the Commissioners or Managers of the Excise for sitting in this Parliament: Because the Qualification of Members to serve in Parliament is a thing, if proper to be meddled with at all, that hath been thought fit, by the Commons, to be in a Bill by itself; and the joining together in a Money Bill things so totally foreign to the methods of raising money, and to the quantity or qualifications of the sums to be raised, is wholly destructive of the freedom of Debates, dangerous to the Privileges of the Lords, hurtful to the Crown, nor may their Lordships be able to give their negative to them, without hazarding the public peace and security."

[Parliament was prorogued without any agreement being come to.]

In 1702 the Lords drew up a Standing Order as follows:

"That the annexing any clause or clauses to a Bill of Aid or Supply—the matter of which is foreign to and different from the said Bill of Aid or Supply—is unparliamentary, and tends to the destruction of the constitution of the Government."

APPENDIX G

Resolutions of the Commons, 1860:

1st. "That the right of granting Aids and Supplies to the Crown is in the Commons alone, as an essential part of their Constitution; and the limitation of all such Grants, as to the matter, manner, measure, and time, is only in them.

2nd. "That, although the Lords have exercised the power of rejecting Bills of several descriptions relating to Taxation by negativing the whole, yet the exercise of that power by them has not been frequent, and is justly regarded by this House with peculiar jealousy, as affecting the right of the Commons to grant the Supplies, and to provide the Ways and Means for the Service of the year.

3rd. "That to guard, for the future, against an undue exercise of that power by the Lords, and to secure to the Commons their rightful control over Taxation and Supply, this House has in its own hands the power so to impose and remit Taxes, and to frame Bills of Supply, that the right of the Commons as to the matter, manner, measure, and time, may be maintained inviolate."

APPENDIX H

Extracts from Erskine May's "Parliamentary Practice" as to the relations of the two Houses in regard to financial legislation, pp. 573, &c.

"The responsibility discharged by the Lords in the grant of supplies for the service of the Crown, and in the imposition of taxation, is concurrence, not initiation. For upwards of a century it has been the custom to present messages (for pecuniary aid) to both Houses, if possible on the same day, addressing the demand for the grant to the Commons, and desiring the concurrence of the Lords by the message presented to their House, a procedure which maintains the constitutional relations of the two Houses of Parliament in matters of Supply."

"The Lords may not amend the provisions in Bills which they receive from the Commons dealing with the above-mentioned subjects (public expenditure or revenue), so as to alter, whether by increase or reduction, the amount of a note on change—its duration, mode of assessment, levy, collection, appropriation, or management; or the persons who pay, receive, manage, or control it, or the limits within which it is leviable."

"When the Lords' amendments necessitate an assertion of the Commons' privileges, the disagreement is made on the ground of privilege; and in the message to the Lords from the Commons, communicating the reasons for their disagreement, the assertion of this claim usually takes the form of a statement that the amendments would interfere with the public revenue, or affect the levy or application of rates, or alter the area of taxation, or otherwise infringe the privileges of the House, and that the Commons consider that it is unnecessary on their part to open any further reason, hoping the above reason may be deemed sufficient. This matter of privilege is generally accepted by the Lords, and the amendments are not insisted upon."

"The Commons again resolved [after the rejection of the Paper Duties Bill in 1860] that the Paper Duties should be repealed, but instead of reckoning the concurrence of the Lords to a separate Bill for that purpose, they included in one Bill the repeal of those duties with the property tax, the tea and sugar

duties, and other Ways and Means for the service of the year; and this Bill the Lords were constrained to accept. The Budget of each year has since that occasion been comprised in a general or composite Act, a proceeding supported by precedent. In 1787 Mr. Pitt's entire Budget was comprised in a single Bill, and during many subsequent years great varieties of taxes were imposed and continued in the same Acts."

APPENDIX I

Preamble to a Finance Bill:

We Your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom . . . have freely and voluntarily resolved to give and grant . . . and do therefore most humbly beseech Your Majesty that it may be enacted, and be it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same.

[The words italicised are peculiar to Money Bills; the words which follow them are those which precede every Act of Parliament whatever its character.]

Preamble to a Consolidated Fund Bill:

We Your Majesty's most dutiful and loyal subjects the Commons of the United Kingdom . . . towards making good the supply which we have cheerfully granted to Your Majesty in this session have resolved to grant unto Your Majesty the sums hereinafter mentioned and do therefore most humbly beseech Your Majesty that it may be enacted, &c.

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